UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS FOGARTY, JR.,

Plaintiff,

-against-

Civil Case No.: 15-cv-01454 (GLS/DJS)

CITY OF TROY and City of Troy Police Officers KYLE JONES and ROBERT SMITH, both Individually and/or as agents, servants, and/or employees of the City of Troy,

Defendants.

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**MEMORANDUM OF LAW**

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Dated: March 2, 2017

Bailey, Johnson, DeLeonardis & Peck, P.C.

BY: ________S/________________________

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## PRELIMINARY STATEMENT

Defendant, Officer Robert Smith, respectfully submits the following Memorandum of Law in support of his Motion for Summary Judgment.

## ARGUMENT

Summary judgment must be granted where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.Pro. Rule 56(c). A fact is material if it may affect the outcome of the case under applicable law and only in dispute if "a reasonable jury could return the verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has demonstrated that there is no genuine dispute of material fact relevant to an element of a claimant issue, the opposing party must tender proof in admissible form showing an issue of material fact for trial. Anderson, 477 U.S. at 250. The failure by the non-movant to produce such evidence renders a claim ripe for summary judgment. Fed.R.Civ.Pro. Rule 56(c).

## POINT I
## PLAINTIFF HAS FAILED TO ESTABLISH A MATERIAL QUESTION OF FACT AS TO WHETHER DEFENDANT ROBERT SMITH IS LIABLE FOR FAILURE TO INTERCEDE.

"In order for a law enforcement officer to be held liable for another officer's use of excessive force, the Plaintiff must prove that "there was a realistic opportunity [for the officer] to intervene to prevent harm". Rogoz v. City of Hartford, 796 F.3d 236, 251 (2d Cir. 2015). Where the alleged excessive force occurs fairly immediate and without warning an officer will not be held liable on a failure to intercede theory. Rogoz, 796 F.3d at 251; O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988).

While there is admittedly a question of fact as to whether Plaintiff was actually subjected to excessive force, under Plaintiff's own rendition of the facts, Officer Smith should be afforded summary judgment. Neither in Plaintiff's Complaint nor in his testimony is there an allegation that Officer Smith used force against Plaintiff. Plaintiff's allegations against Officer Smith are only that he failed to intervene and prevent Plaintiff from suffering harm. Dkt. No. 1. In that respect, assuming *arguendo* the incident occurred as described by Plaintiff, Officer Smith did not have a realistic opportunity to intervene. Plaintiff testified that:

Q. What did you do in response to [Officer Smith's] command?

A. I got on the ground like he said.

Q. And what happened next?

A. He cuffed me behind my back.

Q. Okay. Did anything else occur?

A. Then the officer from the first altercation came running down the alleyway.

Q. And what happened after that?

A. He struck me in the head with his baton. He kicked me twice in my right ribs.

Exhibit "A", p. 30.

Officer Smith testified that he did not know that Officer Jones intended to use his baton, that no warning was given. Smith Aff. ¶10. Officer Smith further described the strikes as "two fluid back to back immediate strikes from short distance." Atty. Dec. Ex.

"C" p. 20. Officer Jones also described the strikes in a similar manner, stating: "I delivered two baton strikes in rapid succession from within close proximity to Mr. Fogarty's right shoulder, upper torso." Atty Dec. Exhibit "B", p. 52.

While both Officers Smith and Jones deny that Plaintiff was kicked during his arrest, the incident, as described by Plaintiff, depicts that the force used by Officer Jones was immediate upon him running in from the alleyway. Officer Smith did not have notice as to what was going to occur, had no opportunity to intervene or prevent the use of force, and had no supervisory authority over Officer Jones. Given these circumstances, Officer Smith should be granted summary judgment. See, Hughes v. Nemier, No. 12-CV-6024-FPG, 2016 WL 7056540, at *2 (W.D.N.Y. Dec. 5, 2016); see also, Henry v. Dinelle, No. 9:10-CV-0456 GTS/DEP, 2011 WL 5975027, at *9 (N.D.N.Y. Nov. 29, 2011)(holding that the force used was "too brief in nature to give Defendant a realistic opportunity to intervene in it"); see also, Toliver v. City of N.Y., No. 10 CIV. 5806 SHS JCF, 2013 WL 6476791, at *4 (S.D.N.Y. Dec. 10, 2013), report and recommendation adopted, No. 10 CIV. 5806 SHS, 2014 WL 549402 (S.D.N.Y. Feb. 11, 2014).

## CONCLUSION

Based on all of the foregoing, it is respectfully submitted that plaintiff's Complaint be dismissed with prejudice pursuant to Federal Rules of Civil Procedure Rule 56 together with any additional relief the Court deems just and proper.